



Legal Update

February 25, 2015

The SJC concludes that there was no probable cause to charge distribution based on the lack of specificity in the police report.

Commonwealth v Ilya I, Juvenile, SJC No. 11637, (2015)

Background: Members of the Youth Violence Strike Force unit with the Boston Police Department were conducting surveillance in an area of Dorchester known for drug and gang activity. The officers observed a male and female approach four (4) black teenagers and engage in a "brief conversation." Two of the teenagers walked with the couple for a short distance while the other two teenagers stood looking up and down the street. When the couple and two teenagers reached a certain point, they had a "brief interaction." Based on their observations, the officers believed "a drug transaction may have occurred," although they did not see an exchange. As the officers approached, the four teenagers walked away "in a hurried manner." The defendant, Ilya I, juvenile (hereinafter referred to as "the juvenile") looked back at the police several times as he crossed the street. The juvenile and one of the teenagers got in the vehicle while two of the teenagers exited the vehicle again. The vehicle drove for a block before the two teenagers returned to the vehicle. The officers approached the vehicle at this point and ordered the juvenile, who was the passenger, to roll down the window. When the juvenile opened the door, the officers smelled an odor of unburnt marijuana and asked the juvenile for identification. The juvenile failed to produce identification and the driver did not have a valid license to operate a motor vehicle. The officers ordered the juvenile and the teenagers out of the vehicle. As the juvenile was getting out the vehicle, the officers noticed that he looked down twice at his groin area. The juvenile's behavior coupled with the smell of unburnt marijuana, prompted the officers

to conduct a patfrisk. The officers recovered thirteen individually wrapped bags of marijuana inside a clear plastic sandwich bag from the juvenile.

The juvenile was arrested and charged with possession of a class D substance with the intent to distribute in violation of G.L. c.94C, §32C (a). A judge in the Juvenile Court allowed the juvenile's motion to dismiss the complaint for lack of probable cause. The Commonwealth filed an appeal and the Appeals Court, reversed the dismissal in an unpublished decision. See *Commonwealth v. Ilya I.*, 84 Mass. App. Ct. 1128 (2014). The SJC granted the juvenile's petition for further appellate review.

Conclusion: The SJC found that the officers lacked probable cause to charge the juvenile with distribution and the complaint was dismissed. The SJC examined the quantity and packaging of the drugs, the juvenile's association with the teenagers, the juvenile's demeanor, the odor of unburnt marijuana, the movement of the vehicle and lack of smoking paraphernalia found on the juvenile before concluding there was no probable cause.

1st Issue: Was there probable cause to charge the juvenile with possession with intent to distribute?

"Probable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." *Commonwealth v. Stewart*, 469 Mass. 257, 262 (2014). Here, there is no dispute that the juvenile had marijuana on his person but rather the crux of the issue was whether there was sufficient basis to charge the juvenile with intent to distribute. The Commonwealth contends that when examining all these factors collectively, there was probable cause. Before rendering its decision, the SJC analyzed all the factors together.

1. Quantity and Packaging:

The SJC concluded that the thirteen individually wrapped bags of an unknown quantity of marijuana along with the manner in which the bags were wrapped failed to raise an inference of intent to distribute. In prior cases, the courts have determined that the number of bags along with how the bags were packaged can raise an inference of distribution. Here, the SJC found that the amount of marijuana contained in each bag was consistent with personal use and without a weight value attached to the individual bags, and there was insufficient evidence to suggest distribution. Comparing this case to where "a few individually packaged rocks of crack cocaine do not suffice" to show intent to distribute, *Commonwealth v. Sepheus*, 468 Mass. 160, 165 (2014). More recently, the SJC found that possession of unknown quantity of five bags of marijuana "small enough that it fit in one pocket of a pair of shorts that the juvenile wore under his pants" was insufficient to show intent to distribute. *Commonwealth v. Humberto H.*, 466

Mass. at 568 (2013). Since the police incident report lacks specificity as to whether the individually wrapped bags contained amounts generally offered for sale, the SJC did not find the number of bags a compelling factor to support the Commonwealth's argument for distribution.

Additionally, the SJC noted that the police report did not indicate that the bags were wrapped in any distinct manner. The police report did not describe the packaging as consistent with drug distribution. See *Commonwealth v. Sepheus*, 468 Mass. at 165-166 (packaging of cocaine insufficient to create inference of distribution where "there was no evidence that the three baggies in this case had been bundled or packaged in a manner that suggests they were the remains of a larger inventory"). See *Commonwealth v. Montanez*, 410 Mass. 290, 305 (1991) (packaging of cocaine in paper folds indicative of intent to distribute); See *Commonwealth v. Gonzales*, 33 Mass. App. Ct. 728, 731 (1992) (bundling of ten packets with elastic band indicative of intent to distribute); *Commonwealth v. Sendele*, 18 Mass. App. Ct. 755, 758 (1984) ("distinct packaging" of drugs supported inference of distribution).

Lastly, the SJC emphasized that the officers did not observe the juvenile interact with the couple at any point during the surveillance. The juvenile's lack of interaction would further raise the question whether the juvenile knew a drug transaction had taken place. Based on the unknown quantity of marijuana and non-descript packaging along with the juvenile's lack of interaction with the couple, the SJC concluded that there was insufficient evidence to establish that the juvenile possessed marijuana with the intent to distribute.

2. Association with teenagers:

The juvenile's interaction with the other individuals prior to the arrest amounts to mere association and did not suggest that there was any criminality. Even though the police were conducting surveillance of the teenagers and their interaction with the couple, the officers never witnessed any items exchanged between them. According to the report, the officers only observed the couple having a "brief interaction" with the teenagers. While an officer does not have to observe an actual exchange, the suspect's movements, must provide factual support for the inference that the parties exchanged an object." *Commonwealth v. Stewart*, 469 Mass. at 263, quoting *Commonwealth v. Kennedy*, 426 Mass. 703, 710 (1998). The police incident report does not claim there was any conduct consistent with a drug transaction. Even if the interaction with the couple during the walk may be deemed consistent with a drug transaction, the narrative lacks any specificity as to whether the juvenile was a participant. The Commonwealth concedes that the police could not prove that the juvenile was present when the alleged drug transaction may have occurred. See *Commonwealth v. Montalvo*, 76 Mass. App. Ct. 319, 330 (2010) (where "evidence that a defendant associated with persons who committed the crime does not lead to an inference that he participated in the crime"). The SJC concluded that without some additional factors suggesting the juvenile's involvement in the criminal activity, probable cause is not supported by his mere association with the group.

3. Juvenile's demeanor:

The Commonwealth contends that the juvenile "looked nervously" at the police officer as he

crossed the street and entered the vehicle. The SJC found that the description of the juvenile's apparent reaction when he knew that the police were present in the area was exaggerated because the report only states that the juvenile "walked away in a hurried manner looking back at the officers several times." Even if the juvenile's behavior could be characterized as nervous, the SJC found that it lacked value in the probable cause assessment. While nervousness in an encounter with a police officer may be a factor in the probable cause analysis, see *Commonwealth v. Sinforoso*, 434 Mass. 320, 324 (2001), it lacks force in the circumstances of this case where a sixteen year old boy is under scrutiny by the police. The SJC further stated that a juvenile's demeanor alone has little weight even though of G.L. c.94C, §32L, decriminalized the possession of one ounce or less of marijuana.

4. Odor of unburnt marijuana:

The SJC concluded that the odor of unburnt marijuana was not a significant factor in considering whether the juvenile was involved with distribution. The SJC held in *Overmyer* that the odor of unburnt marijuana alone was insufficient to justify the warrantless search of a vehicle. *Commonwealth v. Overmyer*, 469 Mass. 16 (2014). Similarly, the "odor of unburnt marijuana alone, does not provide probable cause to conduct a search". See *Commonwealth v. Fontaine*, 84 Mass. App. Ct. 699, 706 (2014). The SJC found that the odor of unburnt marijuana was not a critical factor in establishing whether there was probable cause to patfrisk the juvenile.

5. Traffic pattern of the suspect vehicle:

The SJC also concluded that the police report fails to connect how the vehicle moving from one block to another with teenage passengers was remarkable or otherwise typical of drug activity. Probable cause to believe that a crime has occurred requires something more than innocent behavior. See *Commonwealth v. Roman*, 414 Mass. at 643. Although the vehicle the juvenile was riding in followed two of the teenagers as they walked a block, the SJC did not find it to be a significant factor in determining whether there was probable cause for distribution.

6. Lack of smoking paraphernalia:

The Commonwealth argues that the lack of smoking paraphernalia weighs against mere possession. See *Commonwealth v. Wilson*, 441 Mass. at 401. Aside from the lack of smoking paraphernalia, *Wilson* had other factors such as a relatively large amount of cash, a pager, a cellular telephone, and the distinctive packaging in "dime" bags that suggested intent to distribute. Additionally, "when marijuana is found in a small amount, the lack of drug paraphernalia does not detract from the inference of simple possession." See *Commonwealth v. Humberto H.*, 466 Mass. at 567-568. A person who intends only to smoke marijuana would fit

the profile of the juvenile in this case. The SJC reasoned that the juveniles would need no cash, scales or evenly measured packages in amounts for simple possession.

After examining these factors collectively, the SJC found there was insufficient evidence to establish probable cause that the juvenile intended to distribute the marijuana found on his person. The SJC acknowledged that the decision was close but states that “our analysis accords greater significance to the nature and amount of the substance, and that it was possessed by a juvenile.” Here, the substance was marijuana, and it was a small, undetermined amount with non-distinct packaging. Similar to *Humberto*, the SJC concluded that the juvenile's age detracts from the probative value that otherwise might be accorded to his nervous demeanor and his association with other young black males on a street corner. See *Commonwealth v. Humberto H.*, 466 Mass. at 566-567, (2013). Lastly, the odor of unburnt marijuana, traffic pattern of the vehicle and lack of smoking paraphernalia do not further prove that the juvenile's actions were indicative of distribution over possession.

Commentary: This decision highlights the SJC's expectations for details in police reports. In *Humberto*, the SJC emphasized that a nervous juvenile found possessing five plastic bags of marijuana was insufficient to establish distribution. The SJC found that the lack of weight and other specifics with regard to packaging failed to establish that the juvenile intended to distribute the marijuana.

Although this was a close decision, the dissent in this decision raises some valid and legitimate concerns. According to the dissent, the majority's decision places police departments in a quandary because the SJC is requiring more details in the reports to establish probable cause for arrest.